Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

October Term 1977
No. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,

Appellants,

vs.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,

Appellees.

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ON APPEAL
FROM THE SUPREME COURT
OF THE STATE OF CALIFORNIA

---

## MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16 of the Rules of this Court, the appellees hereby move this Court for an order affirming the judgment below or dismissing this appeal. Should the appeal be construed as a petition for certiorari, the appellees move the Court for an order denying the petition for certiorari. The California Supreme Court opinion is reported at 20 Cal. 3d 180, 141 Cal. Rptr. 905, 571 P. 2d 254. The appellate court decision may be found at 132 Cal. Rptr. 531.

These motions are made on the grounds set forth below.

I

## AN APPEAL IS INAPPROPRIATE IN THIS CASE

The appellants have asserted that appeal is the apprpriate mode for this Court to take jurisdiction of this matter. They suggest that 28 United States Code §1257(2) gives them the right to appeal. They further suggest that the statute, whose constitutionality was upheld, is California Revenue and Taxation Code §201.

It is clear from all of the decisions and briefs below, however, that this section was hardly touched upon by the parties and not addressed at all by any of the courts. If the issue had revolved around a specific statute, the provision addressed would have more likely been Article XIII, §1 of the California State Constitution, not Revenue and Taxation Code §201, which simply impliments the State constitutional mandate.

Thus, 28 United States Code §1257(2) simply does not apply. The assertion of the appellants throughout is that they have the advantage of a Federal constitutional immunity from the uniform application of the California property tax. Such immunity is properly raised by petition for certiorari pursuant to 28 U.S.C. §1257(3).



II

## THE APPELLANTS' NEW FACTS TO SUPPORT A NEW ISSUE ARE INCORRECT AND MISLEADING

The appellants have suggested that new facts regarding a totally new issue cast a different light on this case and rebut the characterization of the property tax made by the California Supreme and Appellate Courts.

The characterization of the property tax as supporting local services rendered to property or because of its presence, is usual (see Watchtower Bible & Tract Society v. County of Los Angeles, 181 Fed.2d 739, 740 (C.A. 9th 1950), cert. den. 340 U.S. 820, 95 L.Ed. 602, 71 S.Ct. 51; Ralston Purina Co. v. County of Los Angeles, 56 Cal.App. 3d 547, 561, 128 Cal.Rptr. 556 (1976), her. den.; Ellis v. Title Ins. & Trust Co., 227 Cal.App.2d 204, 38 Cal.Rptr. 605 (1964); Michelin Tire Corp. v. Wages, 423 U.S. 276, 286, 46 L.Ed.2d 495, 96 S.Ct. 535 (1976).

In order to overcome the characterization of the property tax in general and the California property tax in particular which was expressed below, the appellants offer some excerpts of state and county reports and three "summary sheets" of computations apparently made by appellants' counsel. Both the "facts" and the computations are totally incorrect:

1. The appellants' assumption of what constitutes services to its property would exclude inspection made by the fire departments, jails, the courts, the property tax assessor, legal and administrative support, to mention a few. In addition,

these items are not found in appellants' incomplete evidence.

2. The appellants' computations assume that the total revenues of the county came from property taxes. A review of their own "evidence" shows that for 1972-73 for instance, only $839,202,727.00 comes from property taxes. Aid from other governments is almost exclusively directed to health and welfare.

3. Even the appellants' concluding computations do not support the statement to the effect that two percent of personal property taxes are devoted to "property related" services. They first show what percentage of the total county revenues go toward "property related" services. But instead of applying that percentage against personal property taxes, they go through two additional stages to compute the percentage of the total revenue which is personal property taxes devoted to "property related services." Obviously this last percentage does not show the percent of the appellants' taxes devoted to such services, but is a meaningless ratio.

4. The appellants have ignored the fact that the county is only one of three appellees. No consideration has been given to the city expenditures on fire, police, roads, and overhead, at all.

Any inquiry which deals with "property related services," must also include services rendered by the localities as a result of the presence of the property. It would be appropriate to consider whether by bringing business property



into the taxing jurisdiction, the resulting increase in employment opportunities increases the burdens on the public school, health delivery and welfare systems. The localities should be collecting property tax revenues to support services which must be rendered as a result of the presence of the property.

Finally, the effect of the deduction for property taxes from both state and federal income taxes (often amounting to an effective 50% or more of the property taxes paid) should be considered.

The appellees offer to present evidence regarding all of the matters omitted by the appellants including a showing that a great majority, and possibly all, of the appellants' property taxes go to support services rendered to properties, or because of their presence in the taxing jurisdiction. But the appellees contend that the appellants' new material is both improperly brought before this Court and tends to mislead this Court into believing that the opinion below, and the cases cited, supra, made incorrect characterizations of California's property tax.

## III

## THE INTRODUCTION OF NEW FACTS AND NEW ISSUES AT THIS TIME IS BOTH PREJUDICIAL AND IMPROPER

All of the considerations set forth above should have been fully explored below if the appellants desired to bring the matter of the use of property tax revenues before this Court.

Testimony from budget and economic experts was in order. Such exploration would have allowed the California courts to make appropriate adjustments should some inequity have been discovered.

Exploration of this new issue at this stage is barred by principles enunciated by this Court.

This Court has stated it is not appropriate for it to assume a role in a controversy until the state courts have had a full opportunity to resolve the problem. (Beck v. Washington, 369 U.S. 541, 8 L.Ed.2d 918, 82 S.Ct. 955 (1962); Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1161 (1969).) This rule seems particularly appropriate when the new issue involves the consideration of totally new facts.

Even when the facts are fully explored below, this Court does not usually attempt to reexamine them. (Berenyi v. Immigration Director, 385 U.S. 630, 635, 17 L.Ed.2d 656, 87 S.Ct. 666 (1967).) Here the "facts" presented by the appellants were never raised, nor was any exception taken to the state appellate or supreme court interpretations.

Finally, a state court's construction of state law is conclusive on the Supreme Court of the United States (see Standard Oil Co. of California v. Johnson, 316 U.S. 479, 483, 86 L.Ed. 1611, 62 S.Ct. 1168 (1941).

Appellants claim that the portions of various reports they present are subject to judicial notice (see NLRB v. E. C. Atkins & Co., 331 U.S. 398, 91 L.Ed. 1563, 67 S.Ct. 1265 (1947)). But the case they rely on (as well as the case relied on by NLRB v. E. C. Atkins, supra), involved amplification or amendments to



information which was submitted to the lower courts (see Standard Oil Co. of California v. Johnson, supra).

These official orders are a far cry from the report of a state official such as that presented here which are not subject to judicial notice. (First National Bank of Wellington v. Chapman, 173 U.S. 205, 217, 43 L.Ed. 669, 674, 19 S.Ct. 407 (1899).)

By their silence the appellants have effectively cut off full consideration of the issue they attempt to raise here. They relied on the California Supreme Court's decision in Scandanavian Airlines System v. County of Los Angeles, 56 Cal.2d 11, 14 Cal.Rptr. 25, 363 P.2d 25 (1961).

But on at least four occasions, the appellants had ample warning that Scandanavian Airlines System (hereafter SAS) was not going to provide the protection they desired.

1. On November 8, 1974, the California Supreme Court rendered its opinion in Sea-Land Service, Inc. v. County of Alameda, 12 Cal.3d 772, 117 Cal.Rptr. 448, 528 P.2d 56. That case involved U.S.-owned cargo containers travelling in both interstate and foreign commerce (see Braniff Airways v. Nebraska Board, 347 U.S. 590, 98 L.Ed. 967, 74 S.Ct. 757 (1954)). Sea-Land dealt with virtually all of the issues raised below in this case. (12 Cal.3d 786-788.) Among counsel for the appellants in this case are Sea-Land's counsel in the Sea-Land case. The Sea-Land decision was rendered well before the appellate court rendered its opinion (but after the Superior Court had made its decision). The appellants introduced the new tonnage clause issue,

but not the one they raise here.

2. The appellants brought a similar action for the one year after those in question here, but after the decision in Sea-Land. The Superior Court judge, ruling on virtually identical facts, held that SAS was no longer the protection the appellants thought it was. The intended decision is attached as Exhibit "A." Thus, the appellants were warned for a second time before the Appellate Court heard this case.

3. The California Appellate Court reversed the Superior Court decision in this case in 1976, relying on both the Sea-Land opinion and the Traynor dissent in SAS. The Supreme Court characterized the property tax as paying for "the constant use of many services provided by the state. . . ." and listed fire and police protection and roads as only some of the examples. Neither the Appellants' Petition for Rehearing to the Appellate Court nor the Petition for Hearing to the State Supreme Court contain one mention of dispute with this proposition.

4. Finally, the California Supreme Court rendered essentially the same decision as the Appellate Court. The Appellants filed a Petition for Rehearing and alluded to facts not considered before. Nevertheless, the appellants never once alluded to the new facts and issues they now raise. (Of course, the argument above shows that this new issue is without merit.)



Thus, the appellants are attempting to raise a new issue supported by new facts without giving the appellees any meaningful opportunity to adequately litigate them. But the facts set forth above are enough to show that the new facts are not correct. Both the inadequacy of the evidence presented and the raising of a new issue at this time should lead this Court to reject consideration of this new material and to accept the state court's interpretation.

## IV

## THE APPELLEES' MOTIONS SHOULD BE GRANTED BECAUSE THE OPINION BELOW WAS CORRECT

The California Supreme Court has properly decided that the home-port doctrine is inapplicable and that no treaty prohibits the imposition of the tax in question.

The home-port doctrine was derived from Hays v. Pacific Mail Steamship Line, 58 U.S. (17 How.) 596, 15 L.Ed. 254 (1855) and is a rule of situs of property subject to a full ad valorem tax on each piece of property in the taxing jurisdiction. It is not applicable to property which is rotated in and out of the jurisdiction so that the same number of pieces of property are present throughout the tax year. (Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 35 L.Ed. 613, 11 S.Ct. 876 (1891).) The "continuing presence" of the property is in actuality what is being taxed since that presence is continually maintained throughout the year.

The only contention made by the appellants below is that the above rule, now firmly established for property moving interstate, is not applicable because the property in this case is owned by a foreign company. No inherent difference follows from such ownership. As Elihu Root stated in the Basis of Protection to Citizens Residing Abroad, 4 Proc. Am. Soc. Int'l. L. 16:

> "Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less. . . ."

The appellants assert that because foreign countries may tax differently than we tax, the state should not be able to tax at all. Obviously, the argument goes too far. The power of foreign governments to lay any sort of levy on any property coming within its jurisdiction is apparent. But that power cannot and should not constitutionally prohibit a tax on that same property by the United States or any of the states. Such logic will simply call for commerce clause prohibition of any levy on any enterprise doing business in a foreign country. The effect of the appellants' contentions is to oblige United States governments to exempt property because a foreign government imposes a tax which is unconstitutional in the United States.

In essence the appellants suggest either by treaty or the constitution that there is a law of the United States to the effect that whenever a foreign country taxes its own international enterprises, we cannot tax them.



The treaty interpretation proposed by the appellants is to the effect that should a foreign country not impose a certain kind of tax on American enterprises, Amermican governments are automatically prohibited from imposing that kind of tax on the foreign country's enterprises operating here. Such interpretations, assumes that the United States has given up enormous powers indeed. A Swedish property tax on American property netting $5,000.00 per year can be given up in order to force American governments to give up their property taxes on Swedish property yielding $5,000,000.00. At the same time, Sweden, operating on the basis of complete sovereignty in in the central government, can fund its property-related services from other taxes on American enterprises, while America's federal system is much more complex. No such ability of foreign government should be read into either the Constitution or treaties of the United States.

Implicit in the appellants' position is that Congress has the authority to regulate and/or prohibit any state taxes. It is clear that this was not the intent of the framers of the Constitution (see Federalist Papers No. 32). Nor is it supported by Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 202-203, 6 L. Ed. 23 (1824).

The Federalist Papers deal with the issue in the most forthright terms. As Alexander Hamilton put it, the States,

> ". . . possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. . . . And . . . an attempt on the part of the National Government to abridge them in the exercise of it would be a violent assumption of power unwarranted by

any article or clause of its Constitution." (Federalist Papers No. 32.)

Two state supreme courts have spoken on the issue of the taxability of foreign-owned instrumentalities engaged in foreign commerce. The Washington Supreme Court had occasion to review the imposition of a property tax on railroad cars owned by Canadian Pacific and operating between Canada and the United States. In its decision in Canadian Pacific Railroad v. King County, 90 Wash. 38, 155 P.2d 416 (1916), the court ruled that foreign railroad cars were not subject to a different rule because of their ownership. The court applied the rules previously applied to railroad cars (and other instrumentalities) used interstate (see Pullman's Palace Car Co. v. Pennsylvania, supra).

In California, the appellate court ruled consistently with the Washington Supreme Court in Scandanavian Airlines Systems v. County of Los Angeles, 6 Cal. Rptr. 694. But the majority of the California Supreme Court disagreed, placing principal reliance upon the home port doctrine's application to instrumentalities in foreign commerce (Scandanavian Airlines System v. County of Los Angeles, supra). The State Court reversed its position in Sea-Land Services, Inc. v. County of Alameda, supra, relying heavily upon the Traynor dissent in SAS. Thus, the Washington and California Supreme Courts have spoken together on this issue. The decision below merely carries out the previous decisions. Even the repercussions of an effect on foreign commerce was treated in Sea-Land (12 Cal. 3d at pp. 787-789, 117 Cal. Rptr. at pp. 458-460, 528 P.2d at pp. 66-68).

As a result the treatment of foreign and domestic enterprises is uniform. No competitive



advantage is given to one over the other, and the Federal Government can completely regulate the delicate balance between foreign and domestic goods. To assert otherwise is not only to reject the notions of equality which our nation fosters, but to frustrate every attempt to "fine tune" our relations with foreign governments at the federal level.

## CONCLUSION

The decision below should be affirmed or this appeal should be dismissed. The appellees respectfully so move.

Respectfully submitted,

JOHN H. LARSON
County Counsel

JAMES DEXTER CLARK
Deputy County Counsel

Counsel for Appellees

DEPT SOUTH "O"

Date March 1, 1976
HONORABLE ROY J. BROWN JUDGE
A. VILLA Deputy Sheriff
A. KAWASHIMA Deputy Clerk
BOHE Reporter
Parties and counsel checked if present

5

SO C 38911

JAPAN LINES, LTD., et al

vs.

COUNTY OF LOS ANGELES, et al

Counsel for Plaintiff: GRAHAM & JAMES by: Reed Williams

Counsel for Defendant: JOHN LARSON, County Counsel by: James Dexter Clark, Deputy

NATURE OF PROCEEDINGS: NON-JURY TRIAL (A/O CIVIL)

Cont 1st disp S/ c

This cause having come on regularly for trial on December 12, 1975, the parties having stipulated that the cause be tried upon the facts embraced within their stipulation and that the same be submitted upon such facts and the briefs then on file, and the cause having been thereafter argued and submitted, the Court now renders its decision as follows:

That judgment be entered that the plaintiff take nothing by his complaint and that the defendant be hence dismissed, the defendant to recover its costs.

I believe that the case of Sea-Land Service, Inc. v. County of Oakland, 12 C.3d 772, must be considered as determinative of the issues presented in this case. The facts here are not significantly different from those in Sea-Land. The only factual differences that relate to substance are (1) the owner of the containers in Sea-Land was a domiciliary of a sister state whereas, in this case, the owner is a domiciliary of the Japanese Empire; and (2) in Sea-Land 15% of the container usage was for the interstate transportation of goods and 85% of the usage was for the importing and exporting of goods from or to foreign nations. When viewed in the light of the reasoning of the Sea-Land court, those differences are believed to be unimportant details.

Distilled to its essence the decision in Sea-Land is simply that the "homeport" rule does not afford exemption of an instrumentality of foreign commerce from nondomiciliary taxation if that instrumentality's contact with the nondomiciliary state is so insubstantial as to preclude it from acquiring taxable situs under due process of law concepts. This holding is thought to have been clearly expressed by the Sea-Land court when, in distinguishing the principles applicable to the facts before it from those that governed the decision in Scandinavian Airlines System, Inc. v. County of Los Angeles, 56 C.2d 11, the Court said,

"... the aircraft in SAS had only minimum contacts with Los Angeles, each landing there only eight times per year, while the containers herein have a daily contact with Alameda County and the City of Oakland and have obtained a

(Continued on page two)

DEPT SO "O"

MINUTES ENTERED 3/1/76 COUNTY CLERK



DEPT SOUTH "O"

Date March 1, 1976
HONORABLE ROY J. BROWN JUDGE
A. VILLA Deputy Sheriff
A. KAWASHIMA Deputy Clerk
BOHE Reporter
Parties and counsel checked if present

5A

SO C 38911

JAPAN LINES, LTD., et al

vs.

COUNTY OF LOS ANGELES, ET al

Counsel for Plaintiff

Counsel for Defendant

NATURE OF PROCEEDINGS



taxable situs other than their homeport by such permanency of location and use within the taxing jurisdiction.

"... therefore, we are not inhibited by SAS from concluding that the homeport doctrine does not shield the property of a taxpayer from a fairly apportioned ad valorem tax levied by a nondomiciliary jurisdiction with which the taxpayer has sufficient contacts, even if the taxpayer is engaged in foreign commerce or interstate commerce via international waters. The principles of apportioned taxation enunciated in Ott[illegible] and Braniff are to be applied to [illegible] as argued."

In later parts of the decision the Court rather neatly parried the argument of Sea-Land that adherence to the homeport rule was necessary in order [illegible] simultaneous assessment of taxes upon an instrumentality of either or both foreign or interstate commerce by more than one jurisdiction:

"Merely because a state court is without jurisdiction to compel independent nations to adopt a uniform nondiscriminatory system of taxation, 'It does not follow that the states must forego the power to impose taxes that are not in themselves discriminatory'.

"... Thus the threat of double taxation from foreign taxing authorities has no role in commerce clause considerations of multiple burdens. Indeed, it is gratuitous to suggest that a state is alleviating any threat of multiple burdens by limiting its own taxing power, when foreign nations may tax instrumentalities of commerce that touch their jurisdiction at any rate they choose. The commerce clause mandates apportionment among the

(Continued on page three)

DEPT SO "O"

MINUTES ENTERED 3/1/76 COUNTY CLERK

DEPT SOUTH "G"

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date March 1, 1976 | HONORABLE ROY J. BROWN JUDGE | A. VILLA Deputy Sheriff | A. KAWASHIMA Deputy Clerk | ROSE Reporter | Parties and counsel checked if present

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SO C 38911
JAPAN LINES, LTD., et al

vs.

COUNTY OF LOS ANGELES, et al

Counsel for Plaintiff

Counsel for Defendant

NATURE OF PROCEEDINGS

**Page Three - (Continued)**

several states in order to avoid discriminatory burdens on interstate or foreign commerce. But apportionment among nations is a matter for international agreement; it should not be considered as a limitation on a state's power to tax."

Counsel for defendant is directed to submit a proposed judgment in accordance with the foregoing.

Counsel notified by U.S. mail this date.

Certificate of mailing executed and filed this date.

DEPT SOUTH "G"

MINUTES ENTERED
3/1/76
COUNTY CLERK

MINUTE ORDER